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No. 06-371

Supreme Court, U.S.
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In The

Supreme Court of the United States

COUNCIL OF INDEPENDENT TOBACCO MANUFACTURERS OF AMERICA,

Petitioner,

v.

THE STATE OF MINNESOTA AND DAN SALOMONE, in his Official Capacity as the COMMISSIONER OF THE MINNESOTA DEPARTMENT OF REVENUE,

Respondents.

On Petition For Writ Of Certiorari To The Minnesota Supreme Court

REPLY BRIEF FOR PETITIONER

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ARGUMENT

I. The Act Violates the First Amendment By Taxing Only Those Products Made By Manufacturers Who Refuse to Surrender Their First Amendment Rights and Exempting From the Tax Only Those Products Made By Manufacturers Who Surrender Their First Amendment Rights.

The Act imposes the Tax on identical products based solely on whether the manufacturer has surrendered its First Amendment rights. The Act imposes the Tax on only those cigarettes manufactured by parties who have refused to surrender their First Amendment rights, while exempting cigarettes made by all parties who have surrendered their First Amendment rights. The State has never disputed these facts. Respondents' Br. at 6; Pet. App. at 37. However, the State argues the Act is nevertheless constitutional because it claims the Act "is not aimed at the suppression of speech, it does not reference speech, and it does not offer manufacturers a benefit in a manner calculated to coerce the surrender of speech." Respondents' Br. at 7. The State's arguments fail for several reasons.

Initially, the State concedes that "CITMA properly notes that the government may not condition a tax exemption on the renunciation of free speech rights. *See Speiser v. Randall*, 357 U.S. 513, 529 (1958)." Respondents' Br. at 8. This concession is dispositive and establishes the Act is unconstitutional. It is undisputed that the Act conditions a tax exemption on the renunciation of free speech rights: The *only* way a cigarette manufacturer can obtain an exemption from the Tax imposed by the Act is to surrender certain of its fundamental First Amendment rights – including its rights to free speech, to access the courts and

to lobby its elected representatives. Thus, the Act violates the First Amendment by "condition[ing] a tax exemption on the renunciation of free speech rights," *Speiser*, 357 U.S. at 529, and the remainder of the State's arguments are irrelevant.

II. Contrary to the State's Argument, the Unconstitutional Conditions Doctrine Is Not Limited to Circumstances Where the Law Has An "Improper Purpose" Or Is "Expressly Directed at Speech."

Next, even if the remainder of State's arguments were relevant to determining the constitutionality of the Act, which they are not, each of these arguments fails. First, the State argues that "the unconstitutional conditions doctrine is applied only where a law has as its purpose the suppression of speech." Respondents' Br. at 8-10. The State is wrong.

The unconstitutional conditions doctrine is not limited to laws which have as their purpose the suppression of speech or other constitutional rights. This Court has long since "resolved any doubts about whether direct evidence of improper censorial motive is required in order to invalidate a differential tax [such as the Act] on First Amendment grounds: 'elicit legislative intent is not the *sine qua non* of a violation of the First Amendment.'" *Leathers v. Medlock*, 499 U.S. 439, 445 (1991) (quoting *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 592 (1983)). Indeed, this Court explained more than four decades ago that the legislative purpose underlying a statute like the Act is irrelevant to determining whether the law violates the First Amendment under the unconstitutional conditions doctrine. "In *Speiser v. Randall*, 357

U.S. 513 [1958], we emphasized that conditions upon public benefits cannot be sustained if they so operate, *whatever their purpose*, as to inhibit or deter the exercise of First Amendment freedoms." *Sherbert v. Verner*, 374 U.S. 398, 405 (1963) (emphasis added); *see also Minneapolis Star & Tribune*, 460 U.S. at 592 ("We have long recognized that even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment.").

As this Court explained in a subsequent case, the Minnesota tax law struck down in *Minneapolis Star & Tribune* was unconstitutional *despite* the fact that there was "*no evidence* of impermissible legislative motive in the case apart from the structure of the tax itself." *Leathers*, 499 U.S. at 445 (emphasis added). Instead, the structure of the statute and the improper burden on the taxpayer's First Amendment rights were more than sufficient to establish that the statute was unconstitutional. *Id.* This Court also stressed that the Minnesota tax "resembled a penalty for certain newspapers" since the tax applied only to a small group of newspapers, and that this type of tax "scheme" has a "potential for abuse" that violates the First Amendment. *Id.* at 446; *see also id.* at 447 ("A tax is also suspect if it targets a small group of speakers.").

Even assuming *arguendo* that the State is correct that a statute must have as its purpose the suppression of speech in order to violate the First Amendment under the unconstitutional conditions doctrine, the Act would still be unconstitutional. The language and structure of the Act itself establish that the Act is intended to tax only those products made by manufacturers who have refused to surrender their First Amendment rights through settlement agreements. In its definition of "nonsettlement

cigarettes," the Act expressly exempts from taxation all products made by manufacturers who have surrendered their First Amendment rights by specifically identifying the Minnesota Settlement Agreement in which the major tobacco companies relinquished such rights. Minn. Stat. § 297F.24, subd. 2; Pet. App. 5. In turn, the Act expressly imposes the Tax on only those products made by manufacturers who have refused to surrender their First Amendment rights by not agreeing to a settlement with "similar terms," *i.e.*, terms requiring the manufacturer to surrender certain of its First Amendment rights. Minn. Stat. § 297F.24; Pet. App. 9.

The State also argues that the "unconstitutional conditions doctrine is applied only where a law . . . is expressly directed at speech." Respondents' Br. at 8. Again, the State is wrong.

This Court has long held that statutes which do not expressly reference speech may violate the First Amendment. *See, e.g.*, *NAACP v. Alabama*, 357 U.S. 449, 461 (1958) (although "unintended," the abridgment of free speech rights "may inevitably flow from varied forms of government action" regardless of whether the law in question expressly references First Amendment rights). This Court has struck down state laws under the unconstitutional conditions doctrine when such laws burdened First Amendment rights even though the statutes made no reference to speech or any other First Amendment right. *See, e.g.*, *Sherbert*, 374 U.S. at 404 (statute violated First Amendment as an unconstitutional condition on government benefits "even though the burden may be characterized as being only indirect," and the statute made no reference to any First Amendment right).

Even if the State was correct that a statute must be "expressly directed at speech" to violate the unconstitutional conditions doctrine, which it is not, the Act would still be unconstitutional. The Act is framed in terms of speech and it references speech. In its definition of nonsettlement cigarettes, the Act expressly exempts from taxation products made by manufacturers who have surrendered their First Amendment rights by specifically identifying the Minnesota Settlement Agreement in which the major tobacco companies relinquished such rights. Minn. Stat. § 297F.24, subd. 2. In turn, the Act expressly taxes only those products made by manufacturers who have refused to surrender their First Amendment rights. *Id.* Thus, the State's claim that the Act's "distinction has nothing to do with which manufacturer has waived or not waived its First Amendment rights," Respondents' Br. at 12, is demonstrably wrong. Under the State's misguided logic, the unconstitutional Minnesota tax on ink and paper at issue in *Minneapolis Star & Tribune* was not a tax on speech, but on paper and ink. Of course, this Court correctly rejected such flawed reasoning and held that because the tax targeted select parties based on their First Amendment activities, it was unconstitutional. *Minneapolis Star & Tribune Co.*, 460 U.S. at 591-92. Similarly, in this case the Act is unconstitutional because it is imposed on select parties based on their refusal to surrender their First Amendment rights.

III. Contrary to the State's Argument, the Unconstitutional Conditions Doctrine Is Not Limited to Laws With An "Economic Coercion Element."

The State argues that the Act is constitutional and does not violate the unconstitutional conditions doctrine because the Act does not contain an "economic coercion element" and the Act does not "offer manufacturers a government benefit in a manner calculated to coerce the surrender of free speech rights." Respondents' Br. at 11, 13. Once again, the State is wrong.

There is no requirement under the unconstitutional conditions doctrine that the challenged statute contains an "economic coercion element" or that the law "coerces the surrender" of constitutional rights. This Court held more than thirty years ago that a plaintiff challenging a state law under the unconstitutional conditions doctrine does *not* have to show that it has been or will be coerced into surrendering its constitutional rights, nor must a plaintiff show that it has been or will be deterred from exercising its constitutional rights. *See Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 257-259 (1974).

In *Memorial Hospital*, this Court held that a statute which "operates to *Penalize* those persons who have exercised their constitutional right of interstate migration" is unconstitutional when it is not supported by a compelling government interest; the fact that no plaintiffs were deterred from exercising their constitutional rights or coerced into waiving their rights was irrelevant to this Court's analysis. *Id.* (emphasis and capitalization in original); *see also Shapiro v. Thompson*, 394 U.S. 618, 634 (1969) (state statute held unconstitutional even though none of the plaintiffs were deterred from exercising their

constitutional rights or coerced into waiving their rights); *Dunn v. Blumstein*, 405 U.S. 330, 339-340 (1972) (no requirement that plaintiffs be deterred from exercising their constitutional rights or coerced into waiving their rights in order to strike down state statute under the unconstitutional conditions doctrine); *Sherbert*, 374 U.S. at 406 ("[T]o condition availability of [unemployment] benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties" regardless of whether she is or will be deterred from exercising such rights or coerced into waiving such rights). As this Court explained in *Dunn*, "[i]t has long been established that a State may not impose a penalty upon those who exercise a right guaranteed by the Constitution." 405 U.S. at 341 (quoting *Harman v. Forssenius*, 380 U.S. 528, 540 (1965)). Likewise, in analyzing this Court's unconstitutional conditions doctrine, one commentator has correctly noted that "the government did not use benefits to induce the surrender of [constitutional] rights in *Sherbert* or *Shapiro* as it did in *Speiser*," yet this Court still held the state statutes unconstitutional in *Sherbert* and *Shapiro* because the laws penalized plaintiffs for retaining or exercising their constitutional rights. Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1435 (1989).

Thus, a state statue is unconstitutional under the unconstitutional conditions doctrine when the law penalizes a plaintiff for its retention or exercise of its constitutional rights, regardless of whether the law coerces the waiver of constitutional rights or deters the exercise of such rights. *Sherbert*, 374 U.S. at 406; *Memorial Hospital*, 415 U.S. at 257-259; *Dunn*, 405 U.S. at 339-340; *Shapiro*,

394 U.S. at 634. And that is exactly what the Act does in this case: CIMTA members are penalized for retaining their First Amendment rights because their products are subject to the Tax while their competitors' identical products are exempt from the Tax because their competitors have surrendered their First Amendment rights. Accordingly, the Act is unconstitutional.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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